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Fortuna Enterprises, L.P. a Delaware Partnership d/b/a The Los Angeles Airport Hilton Hotel and Towers *and* UNITE HERE, Local 11. Cases 31–CA–27837, 31–CA–27954, and 31–CA–28011

April 30, 2009

DECISION AND ORDER REMANDING

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On October 21, 2008, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified below, and to adopt the recommended Order as modified.[4]

The unfair labor practice issues in this case arose during the Union's 2006 campaign to organize employees at the Respondent's Los Angeles Airport Hilton Hotel and Towers. We affirm the judge's findings, for the reasons set forth in his decision, that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing written warnings to five employees for alleged violation of hotel policy.[5] We also affirm the judge's findings, for the reasons he stated, that the Respondent committed multiple violations of Section 8(a)(1) of the Act, including interrogating and threatening employees;[6] denying hotel access to employees wearing union insignia; issuing a written warning to employee Nathalie Contreras for engaging in protected concerted activity;[7] and suspending 77 employees for engaging in a protected concerted work stoppage for 2 hours in the employee cafeteria in an effort to discuss a coworker's suspension with senior management.[8]

However, we find that the judge's decision does not provide an adequate basis for review of his finding that the Respondent's banquet chef, Pablo Burciaga, violated Section 8(a)(1) by physically pushing employees Herman Chan, Antonio Campos, and Juan Banales away from employees engaged in protected concerted activity, and by pushing his finger into the chest of employee Mike Kaib when Kaib protested Burciaga's action. That finding is apparently based on the testimony of Campos and Banales. Neither Kaib nor Chan testified. Burciaga de-

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] There are no exceptions to the judge's dismissal of 8(a)(1) allegations that the Respondent's officials prevented employee Ihab Judeh from participating in union activity; Executive Chef Rolf Jung interrogated employee Antonio Campos; Guest Services Manager Chriss Draper threatened employee Jasmine Ortiz; and Director of Housekeeping Services Ana Samayoa threatened to suspend employee Dolores Hernandez.

[4] We shall substitute a new notice with introductory language that accords with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[5] We find it unnecessary to pass on whether the warnings separately violated Sec. 8(a)(1) because such a finding would not materially affect the remedy.

Member Schaumber agrees with the judge's finding that the Respondent disparately applied its new Use of Location Policy to the employees and used this policy as a pretext to discipline known union supporters who did not even violate the rule. He finds it unnecessary to consider the adequacy of the Respondent's investigation of the employees' conduct as evidence of its discriminatory motivation. Chairman Liebman concurs that a violation can be found even on this narrower factual basis.

[6] We find it unnecessary to pass on whether Guest Services Manager Draper interrogated employee Ortiz and unlawfully threatened to suspend employee Johnson, or whether Director of Housekeeping Samayoa unlawfully threatened to suspend employee St. Wenceslaus Lawrence, as such findings would be cumulative and would not materially affect the remedy.

[7] In affirming the finding that the Respondent unlawfully warned Contreras for displaying posters protesting customer harassment of employees, we find it unnecessary to rely on the judge's finding that there were no complaints about the posters during the brief time they were displayed.

[8] In affirming the finding that the Respondent unlawfully suspended employees for engaging in this work stoppage, we do not rely on the judge's characterization of General Manager Grant Coonley and Director of Food and Beverages Tom Cook as having "chosen" not to listen to the employees' concerns. The record demonstrates that Coonley was not at the facility that morning, and Cook was occupied serving guests in the restaurant.

Member Schaumber believes that the length of the work stoppage in the cafeteria and the potential for interference with the provision of services there make this a close case. However, he recognizes that current Board precedent supports the judge's finding that the unrepresented employees did not lose the protection of the Act, particularly when the Respondent's officials failed to make it clear that the employees would not be able to meet with senior management at that time and would have alternative opportunities to present their concerns.

nied touching the employees and denied raising his hands toward Kaib. Restaurant Manager Efren Vasquez, who was present during this incident, did not testify, but the Respondent's investigatory notes of his version of what took place were admitted into evidence.

The judge discredited Burciaga's denials of physical contact with employees because the notes of Vasquez' version contradicted that testimony. The judge did not make any express findings with respect to the credibility of Campos and Banales addressing their demeanor, differences in their accounts of the incident, and differences between their accounts and those set forth in the notes from the investigatory interview of Vasquez. In the absence of detailed factual findings and credibility resolutions, we are unable to resolve the Respondent's exceptions to the judge's finding that Burciaga acted unlawfully. Accordingly, we shall sever this issue from the remainder of the case and remand it to the judge so that he may reconsider the record evidence, make credibility determinations, and provide an analysis explaining the basis for his findings. In remanding this issue, we express no opinion as to the correctness of the judge's original disposition of the merits of the contested complaint allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Fortuna Enterprises, L.P. a Delaware Limited Partnership d/b/a/ The Los Angeles Airport Hilton Hotel and Towers, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c) and reletter subsequent paragraphs accordingly.

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the consolidated complaint allegation that the Respondent violated Section 8(a)(1) of the Act by physically pushing and touching employees for engaging in protected concerted activities is severed from this case and remanded to the administrative law judge for further appropriate action consistent with this decision.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. April 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend you or issue you written warnings because you engage in union or other protected concerted activities.

WE WILL NOT interrogate you about your union and other protected concerted activities.

WE WILL NOT threaten you with violence if you engage in protected concerted activity.

WE WILL NOT deny you access to our facility and threaten you with trouble if you enter the hotel because you wear union insignia.

WE WILL NOT threaten you with suspension or unspecified reprisals if you participate in union or protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL make whole the below-named employees for any loss of wages and benefits, with interest, that they suffered as a result of their suspensions:

Juan Jimenez	Josefina Castillo
Silviano Castillo	Juana Salinas

Agustin Vega	Juliete Cabrera
Juan Vizuete	Kathy Andrade
Marco Zamudio	Lazaro Orellana
Rosario Mendoza	Lazaro Soto
Alejandra Chamorro	Lenardo Reynoso
Alicia Huizar	Lidia Zavala
Benjamin Lopez	Lilia Magallon
Francisco Diaz	Lillian Alcantara
Miguel Vargas	Manuel Alvarez
Patricia Simmons	Maria Ceja
Raul Gonzalez	Maria Hernandez
Rigoberto Gomez	Maria Martinez
Wilfredo Matamoros	Maria Nunez
Alberto Barajas	Maria Osuna
Richard Acosta	Marina Rivera
Samuel Zambrano	Raquel Benitez
Cliff Lai	Reyna Vasquez
Adela Barrientos	Rigoberto Matamoros
Amelia Luna	Rolando Romero
Ana Flamenco	Rosa Vaca
Blanca De la Torre	Rosie Delgado
Christopher Fawcett	Ruben Can
Claudina Colomer	Silvia Alvarez
Concepcion Molina	St. Wenceslaus Lawrence
Edith Garcia	Susana Argumedo
Estela Cabreras	Victor Salgero
Eva Pulido	Zulma Jurado
Fernando Gutierrez	Concepcion Ortiz
Gloria Saldana	Jose Luis Garcia
Guadalupe Perez	Jose Molina
Immacula Rene	Maria Letona
Isabel Brentner	Mauricio Hernandez
Ivan Gomez	Fernando Vasquez
Jaime Chamul	Fidel Andrade
Joanna Gomez	Nieves Contreras
Jose Ayala	Ricardo Chapa

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspensions of the above named employees as well as the unlawful written warnings of Nathalie Contreras, Patricia Simmons, Isabel Brentner, Lilia Magallon, Joanna Gomez, and Isabel Salinas and, WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions or written warnings will not be used against them in any way.

FORTUNA ENTERPRISES, L.P. A DELAWARE LIMITED PARTNERSHIP D/B/A THE LOS ANGELES AIRPORT HILTON HOTEL AND TOWERS

Rudy L. Fong-Sandoval, Esq. and *Nathan Laks, Esq.,* for the General Counsel.

Stephen R. Lueke, Esq. and *Steven M. Kroll, Esq. (Ford and Harrison, LLP),* of Los Angeles, California, for the Respondent.

Eric B. Myers, Esq. (Davis, Cowell and Bowe, LLP), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Los Angeles, California, on April 14–18 and 21–25, May 12–15, and June 2–4, 2008, upon the amended order consolidating cases, consolidated complaint, as amended,[1] the compliance specification and notice of hearing issued on March 21, 2007, by the Regional Director for Region 31.

The consolidated complaint and compliance specification (the complaint) alleges that Fortuna Enterprises, LP, a Delaware Limited Partnership d/b/a/ the Los Angeles Airport Hilton Hotel and Towers (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by suspending 77 employees for engaging in a work stoppage; by interfering with an employee's right to engage in union activity by ordering the employee to take a break earlier than scheduled; by interrogating employees regarding their union or protected concerted activity; by coercing employees; by physically touching and pushing them for engaging in union or protected concerted activity; by threatening employees with violence if employees engaged in union or protected concerted activity; by threatening employees with trouble for wearing union paraphernalia; by threatening employees with suspension if they engaged in union or protected concerted activity; and by denying employees access to the Respondent's facility to engage in union or protected concerted activity.

It is alleged that Respondent violated Section 8(a)(1) and (3) of the Act by disciplining employees Nathalie Contreras, Isabel Brentner, Lillia Magalon, Isabel Salinas, Patricia Simmons, and Joanna Gomez for engaging in union and other protected-concerted activities.

The compliance specification alleges that the 77 employees suspended on or about May 11, 2006, are owed backpay as set forth in appendix A to the complaint in the total sum of $36,067.93.

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing. While denying any wrongdoing or that the 77 employees are entitled to backpay, Respondent admitted that the amounts of backpay as set forth in the compliance specification are correct.

FINDINGS OF FACT

Upon the entire record herein, including the briefs from the counsel for the General Counsel (CGC), the Charging Party, and Respondent, I make the following[2]

[1] At the hearing, counsel for the General Counsel withdrew complaint allegations 18(a) and (b).

[2] On August 28, 2008, Respondent filed a "Motion to Strike Portion of Charging Party's Post Hearing Brief." Respondent contends that the Charging Party's assertion in its posthearing brief at p. 5, fn. 2 is not supported by any record evidence concerning the suspension of employee Alicia Melgarejo. Since I do not rely in any manner on the assertion by the Charging Party regarding Melgarejo, it is not necessary to rule on Respondent's motion.

I. JURISDICTION

Respondent admitted it is a Delaware limited partnership with an office and place business located in Los Angeles, California, where it is engaged in the operation of a hotel providing food and lodging. Annually, Respondent in the course of its business operations derived gross revenues in excess of $500,000 and purchased and received at its Los Angeles, California facility goods or services valued in excess of $10,000 directly from suppliers located outside the State of California.

Based upon the above, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admitted and I find that UNITE HERE Local 11 (the Charging Party) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent owns and operates the Los Angeles Airport Hilton Hotel and Towers, located at 5711 West Century Boulevard, Los Angeles, California. At Respondent's facility Grant Coonley is the general manager, Sue Trobough is the director of human resources, Rochelle Romo was assistant director of human relations, Tom Cook is the director of food and beverage, Ana Samayoa is the director of housekeeping services, Rolf Jung is the executive chef, Manny Collera is assistant director of food and beverage, Efren Vasquez is a restaurant manager, Chriss Draper is guest services manager, Graham Taylor is chief of security, Jim Davis is the property operation director, Erik Burkhart is the director of front office operations, Ava Hirschsohn is the guest assistance manager, Clifton Hebert is the sous chef, Pablo Burciaga is the banquet chef, Rogelio de la Rosa is chief steward, Luis Gallardo was night manager/security supervisor**,** Jose Cano is the assistant director of housekeeping, and Daisy Argueta is a security guard. Respondent has admitted that above-named individuals are supervisors and/or agents of Respondent within the meaning of Section 2(11) and (13) of the Act.

A. The 8(a)(1) Allegations

1. The incident involving front desk employee Ihab Judeh

a. The facts

Complaint paragraph 7 alleges that in or around March 2006 Ava Hirschsohn (Hirschsohn) and Erik Burkhart (Burkhart) interfered with employees' rights to engage in union activity by preventing an employee from engaging in a scheduled union demonstration.

Ihab (Darren) Judeh (Judeh) was employed by Respondent as a customer service agent at the front desk until August 2007 when he resigned to attend college. In early March 2006, the Charging Party was engaged in a picket line in front of Respondent's facility at noon. Judeh planned to participate in this picket line during his 30-minute noon lunchbreak, which had been scheduled by his supervisor for 12 p.m. Before his lunchbreak at about 11:45 a.m., fellow customer service agent Teresa returned from her break and told Judeh to take his lunchbreak. Judeh replied that he wanted to take his break at noon. At about this time Judeh's supervisor, Pilar, approached him and said, "Darren, I heard there's a problem with your break." Judeh replied that there was no problem but that he wanted to take his break at noon as it had been scheduled. Pilar asked Judeh if he could take the break now. Judeh said no, he wanted to take the break at noon. A minute later, Hirschsohn came up to Judeh and told him to go on his break. Judeh said he would take his break as scheduled at noon. Hirschsohn said Judeh was affecting business and he should go on his break right now. Judeh asked how he was affecting business since there was low occupancy in the hotel and it was slow. Hirschsohn said she wanted no further discussion and told Judeh to take his break now. Next Burhart approached Judeh and said he had heard there was a problem with Judeh's break. Judeh said they want me to take my break now but I was planning to take my break at noon as scheduled. Judeh said he thought the reason that they wanted him to take his break early was because they were trying to prevent him from going to the picket march. Burkhart said, "Darren, take your break right now and don't cause any problems." It was 11:55 a.m. when Judeh took his lunchbreak. He participated in the picketing in front of the hotel for about 20 minutes.

b. The analysis

The Respondent's break policy for front desk employees in March 2006 was for the supervisor to assign breaks to employees at the beginning of the shift. According to Burkhart, prior to January or February 2006, Respondent had a written break schedule policy that provided desk clerks to take their break according to a fixed schedule. Burkhart claims to have modified this schedule without putting it into writing to provide that front desk clerks take their breaks according to the guests' needs. Burkhart had no information as to how this policy was communicated to the front desk clerks. According to Judeh, on March 6 or 7, 2006, he was assigned a breaktime of 12 noon. According to Hirschsohn, on March 10, 2006, the hotel was particularly busy due to an arriving group of guests and this was the reason Judeh had to take his break early. However, Hirschsohn was unable to provide any details about when the guests were to arrive, how many were due to arrive around noontime, or whether the hotel was busy at noontime on either March 6, 7, or 10, 2006. Burkhart testified that the need for Judeh to take his break early was due to the fact that another front desk clerk had just returned from her break.

There is no evidence that Supervisors Pilar, Hirschshon, or Burkhart had any knowledge that Judeh planned to participate in the union picket line on either March 6, 7, or 10, 2006, at the time the issue first arose and until Judeh volunteered that he was going to participate in the picket line at about 11:50 a.m.

Despite the conflicting reasons Hirschsohn and Burkhart gave for requiring Judeh to take his break ahead of schedule, there is no evidence that any supervisor knew that Judeh planned to take part in the union picket line at the time he was requested to take his break early. In the absence of such knowledge, Respondent can not have attempted to interfere,

restrain, or coerce Judeh in the exercise of his rights to engage in union activity. I will dismiss this portion of the complaint.

2. The March 3, 2006 interrogation of Molina

a. The facts

Complaint paragraph 8 alleges that on or about March 3, 2006, Sous Chef Clifton Hibbert interrogated an employee about a union meeting.

Alberto Barajas (Barajas) works for Respondent as a cook. Barajas' supervisors included Sous Chef Clifton Hibbert (Hibbert). On March 2, 2006, Barajas went to a meeting held by the Charging Party with other employees of Respondent including cook Ricardo Molina (Molina). At work the next day in the presence of Barajas, Hibbert asked Molina, "How was the meeting yesterday? Did you go to the meeting?"[3] Molina did not respond.

b. The analysis

Asking employees about their attendance at union meetings has been held to constitute coercive interrogation in violation of Section 8(a)(1) of the Act. *Metropolitan Regional Council,* 352 NLRB 701 (2008); *Nanticoke Homes, Inc.,* 261 NLRB 736 (1982). Hibbert's interrogation of Molina was coercive interrogation and violated Section 8(a)(1) of the Act.

3. The coercive pushing of employees by Banquet Chef Pablo Burciaga.

a. The facts

Complaint paragraph 9 alleges that in March or April 2006 Banquet Chef Pablo Burciaga coerced employees by physically pushing them back toward their workstations during an employee meeting to meet with Managers Manny Collera and Efren Vasquez.

In April 2006, a meeting of about 18 employees took place in the kitchen area at Respondent's facility with Manny Collera (Collera) assistant director of food and beverage and Restaurant Manager Efren Vasquez (Vasquez). This was a regularly scheduled preshift meeting of the servers called by Collera and Vasquez. At this meeting the employees sought permission to place a piggy bank in the kitchen and dining areas so employees could contribute for the purchase of kitchen equipment. According to cooks Antonio Campos (Campos) and Juan Banales (Banales), employees had previously complained to supervisors about the lack of needed cooking items but not enough had been provided. According to Campos, employee Mike Kaib asked both Collera and Vasquez if they could have permission to place a piggy bank in the kitchen to purchase kitchen equipment. Collera said he had no authority to give permission for the piggy bank. Kitchen employees Herman Chan, Campos, and Banales listened in on the meeting. Banquet Chef Pablo Burciaga (Burciaga) then approached employees Herman Chan, Campos, and Banales and told them if they were not on break they should return to work. Burciaga then grabbed Campos, Chan, and Banales, who were not on break, by the shoulders and shoved them back toward their workstations in the kitchen. Kaib then came up to Burciaga and said, "What are you doing. We aren't doing anything wrong." Burciaga pushed Kaib in the chest and told him to go to his business.[4] The record establishes that employees regularly spoke among themselves in the kitchen about non work-related subjects during working time.

b. The analysis

It is clear that the employees gathered in the kitchen area of the hotel were engaged in protected-concerted activity for the purpose of seeking funds to purchase needed kitchen equipment. While the employees were not in their work areas and not on break, the record establishes that employees regularly moved around in the kitchen and spoke about nonwork-related subjects. Further, Burciaga's conduct went beyond any legitimate efforts to persuade employees to return to work. The Board has found that acts of physical touching of employees while engaged in protected-concerted activity, including pushing, grabbing an employee's arm and shaking a fist at an employee may violate Section 8(a)(1) of the Act. *Impressive Textiles, Inc.,* 317 NLRB 8, 13 (1995); *Kenrich Petrochemicals,* 294 NLRB 519, 535 (1989); *Rike's a Division of Federated Department Stores,* 241 NLRB 240, 252 (1979). Here, in order to prevent Campos, Chan, and Banales from engaging in a protected-concerted meeting, Burciaga grabbed and pushed each individual away from the meeting and poked his finger into Kaib's chest when Kaib attempted to intervene for the three employees. Such action was a coercive attempt to interfere with the employees' rights to engage in protected-concerted activity and violated Section 8(a)(1) of the Act.

4. The threat to employee Campos

a. The facts

Complaint paragraph 10 alleges that in March or April 2006 Banquet Chef Pablo Burciaga threatened an employee, who had participated in a meeting with Managers Collera and Vasquez, that if he saw employees standing near the employee's workstation he would use violence against the employees.

About 30 minutes after Burciaga had pushed employees back to their workstations in April 2006, Burciaga went to Campos' workstation and said Campos could not be with his fellow employees if he was not on a break. Campos asked Burciaga what he would do if coworkers came to his workstation. Burciaga replied that he would, "Fire them to [sic] shits along with you." When Campos said he would like to see that Burciaga said, "I'll fire them to [sic] shits along with you." In addition in his affidavit Campos said that Burciaga threatened to, ". . . kick their asses out of here, including you."

[3] Hebert denied interrogating Molina. Hebert's testimony generally lacked credibility. Thus, despite having worked and spoken with Molina and Barajas every day for 20 years, Hebert denied knowing whether employees were involved in union organizing or even spoke about a union. I credit Barajas' testimony.

[4] While Burciaga denied making contact with the employees, Respondent's restaurant manager, Vasquez, in an investigation conducted by Respondent said that he saw Burciaga grab employee Campos. Further, while Burciaga denied raising his arms toward Kaib, in the investigation Vasquez admitted he saw Burciaga raise his hand up towards Kaib. I do not credit Burciaga's testimony.

b. The analysis

The Board has found statements threatening physical harm for engaging in protected activity violate Section 8(a)(1) of the Act. Indeed a company owner who told an employee who had filed an unfair labor practice charge over his suspension: "This isn't a threat, but I want to kick your ass," violated Section 8(a)(1) of the Act. *Cox Fire Protection,* 308 NLRB 793 (1992). In this case, Burciaga threatened to "fire employees to shits" along with Campos and to "kick their asses", if they engaged in protected concerted activity at Campos' workstation. This conduct constitutes threats of physical harm by a supervisor and violates Section 8(a)(1) of the Act.

5. The April 2006 Chriss Draper interrogation and threat

a. The facts

Complaint paragraph 11 alleges that in April 2006 Guest Services Manager Chriss Draper (Draper) interrogated an employee about her participation in an employee meeting and paragraph 13 alleges that in April 2006 Draper threatened an employee that participating in union activity could get the employee in trouble.

According to parking cashier Concepcion Jasmine Ortiz (Ortiz) in April 2006 she had attended a meeting with 15–20 employees in the kitchen area of Respondent's hotel. The purpose of the meeting was to talk to the kitchen manager about a poster offering a reward to find out who was damaging the kitchen.

About 3 days later,[5] Ortiz was approached by Draper and they went to Draper's office. Draper asked Ortiz if she had attended the meeting in the kitchen. When Ortiz said she had, Draper asked Ortiz why she had attended. Ortiz said she was the leader of the Union. Draper then said, "Oh my God, do you know how much trouble you're getting into?" Draper said he had no trouble with the Union but his bosses told him they were mad because Ortiz was in the employee kitchen meeting.[6] Ortiz said she had to support her employees. Draper replied, "You're getting into too much trouble if you continue with this." Ortiz said she had to do what she had to to.

b. The analysis

The only credible evidence concerning this allegation is that Draper asked Ortiz if she had attended a kitchen meeting. This conversation took place in Supervisor Draper's office at the time he was giving Ortiz a warning for participating in the very protected, concerted activity he questioned her about. Under all of these circumstances, I find that the interrogation was coercive under the test set forth by the Board in *Rossmore House,* 269 NLRB 1176 (1984). Draper's questioning violated Section 8(a)(1) of the Act. However, I find no probative evidence to support complaint paragraph 13 and I will dismiss that portion of the complaint.

6. The April 2006 interrogation by Executive Chef Rolf Jung

a. The facts

Complaint paragraph 12 alleges that Executive Chef Rolf Jung (Jung) interrogated an employee about what he would do in the event of a strike.

According to cook Campos in April or May 2006, just before he started work, he had a meeting with Jung and Burciaga in Jung's office. Jung asked Campos if the employees went on strike, could he come with them.[7] Campos asked, "What strike are you talking about, chef? Jung replied, "A strike. If they are going to strike, can I come with you?"[8] Campos said, "I don't know what you're talking about" and he left Jung's office. Frankly, Campos' testimony makes little sense and it is improbable that Jung said that he wanted to go with the strikers. Given the improbable nature of Campos' testimony, I do not give it credit.

b. The analysis

Jung admitted that in response to Campos' volunteering that something was going to happen, he asked Campos what was going to happen. When Campos did not respond, Jung asked if there was going to be a walkout or strike. This was not coercive interrogation in view of the fact that Campos initiated the conversation and Jung was merely attempting to discover what Campos was talking about. In the absence of probative evidence that Jung interrogated Campos, I will dismiss this complaint allegation.

7. The April 21, 2006 union paraphernalia issues

a. The facts

Complaint paragraph 14(a) alleges that on April 21, 2006, security guard Daisy Argueta (Argueta) blocked employee access to the hotel because the employees were wearing union T-shirts and complaint paragraph 14(b) alleges on the same date Argueta threatened employees with problems if they entered the hotel wearing union T-shirts.

In the spring of 2006, Respondent's on-call banquet server Ana Maria Mendez (Mendez) went to the hotel to pick up her paycheck. Mendez entered the hotel through the loading dock to go to Banquet Manager Charles Perera's office where she usually received her check. Mendez was with employee Bea-

[5] The written discipline issued to Ortiz is dated April 22, 2006, more than 2 weeks after the kitchen meeting.

[6] Draper admitted asking if Ortiz was in the kitchen meeting but denied threatening her. Tr. 1162–1163. I found Draper to be a credible witness whose testimony was consistent and detailed. On the other hand, I found Ortiz' testimony vague and lacking in credibility.

[7] The Charging Party filed a motion to correct transcript on August 22, 2008. The Charging Party contends that the Tr. 78, LL. 19 to 25 should be corrected to reflect that the word "count" should be substituted for the word "come" in LL. 20, 23, and 25. At the hearing, the witness gave this testimony in the English language and no clarification of the witness' testimony was attempted by any party. To substitute the word "count" in the context of the witness' testimony that Jung asked ". . .can I come with you?" makes no grammatical or logical sense. The motion is denied.

[8] Jung testified that Campos came into his office and said that "something is going to happen." Jung then asked Campos what was going to happen. When Campos did not respond, Jung asked if there was going to be a walkout or a strike.

trice Reyes (Reyes) and Mike (last name unknown). Both Reyes and Mendez were wearing union T-shirts with 2-1/4-inch red lettering that said "UNITE HERE" across the front of the T-shirt. When attempting to enter the hotel at the loading dock, security guard Argueta stopped Mendez, Reyes, and Mike and said they could not enter the hotel wearing the union T-shirts. Argueta added that if they didn't want to have any problems that they should stay out of the hotel with the T-shirts on and to take them off. While Argueta continued to bar the door through which the employees attempted to enter, after a few minutes the employees entered the hotel while still wearing the T-shirts at another door 10 to12 yards away from Argueta. In the past, both Mendez and Reyes had entered the hotel while off duty wearing clothing without union logos.

b. The analysis

Limiting access of off-duty employees to an employer's facility because of an employee's union activities violates Section 8(a)(1) of the Act. *Mediplex of Wethersfield,* 320 NLRB 510, 512 (1995). In the instant case, both Mendez and Reyes were stopped by Respondent's security guard, an admitted agent of Respondent, for wearing union T-shirts and were told by the guard they would have trouble if they entered the hotel wearing the union shirts.

Respondent contends that because Mendez and Reyes entered the hotel wearing the union shirts after a brief period, that there is only a de minimus violation. Respondent's reliance on *Yellow Ambulance Service,* 342 NLRB 804, 810 (2004), is misplaced. In *Yellow Ambulance Service,* the General Counsel was unable to show how the impact of requiring a new employment application from union supporters desiring to switch from full-time to part-time status adversely affected employees in any material way. Here, the security guard's unsuccessful attempt to bar employees who were displaying union shirts from entering the hotel, does not establish that her threats and attempts to preclude employees from gaining access were not coercive and chilling of the employees' Section 7 rights. I find that Respondent violated Section 8(a)(1) of the Act by barring employees from entering its facility for wearing union shirts and by threatening employees if they entered the hotel wearing union shirts.

8. The May 11, 2006 Chriss Draper threat of suspension

a. The facts

Complaint paragraph 15 alleges that on May 11, 2006, Draper threatened an employee with suspension if she went to an employee meeting in the cafeteria.

Whitney Johnson (Johnson) was employed by Respondent as a valet parking cashier. On May 11, 2006, at about 8 a.m. Johnson was told by her supervisor, Jose Moran, that the Union was in the employee cafeteria and not to go down there because the police were involved. Just before 10 a.m., when she was due to end her shift, Draper told Johnson, "Whitney, the Union is downstairs at the employee cafeteria. If you go down there, you will get a suspension, and I don't want to do that."[9]

b. The analysis

Threats of discipline for engaging in protected activity violate Section 8(a)(1) of the Act. *Johnnie Johnson Tire Co.,* 271 NLRB 293, 296 (1984). Draper's threat to Johnson that she would be suspended if she joined her fellow employees' in their protected, concerted work stoppage violated Section 8(a)(1) of the Act.

9. The May 11, 2006 Rogelio de la Rosa threat of suspension

a. The facts

Complaint paragraph 16 alleges that on May 11, 2006, Chief Steward Rogelio de la Rosa threatened an employee with suspension if the employee left the hotel in support of an employee walkout.

Fidel Andrade (Andrade) was employed by Respondent as a cafeteria cook. On May 11, 2006, Andrade was present in the employee cafeteria during the employee work stoppage. It is uncontroverted that Andrade's supervisor, Chief Steward Rogelio de la Rosa (De la Rosa), told Andrade that he was not supposed to be in the cafeteria, that he was way over his breaktime and that he should go back to work. Andrade replied that if the employees were sent home, he was going to go with them. Later, De la Rosa returned to the cafeteria and found Andrade still there with other employees. De la Rosa told Andrade that if he saw him in the cafeteria again he was going to have to suspend him.

b. The analysis

As noted above, threats of discipline for engaging in protected activity violate Section 8(a)(1) of the Act. *Johnnie Johnson Tire Co.,* 271 NLRB 293, 296 (1984). De la Rosa's threat to suspend Andrade for joining fellow employees' protected-concerted work stoppage violated Section 8(a)(1) of the Act.

10. The May 11, 2006 Ana Samayoa threat of suspension

a. The facts

Complaint paragraph 17 alleges that on May 11, 2006, Director of Housekeeping Services Ana Samayoa (Samayoa) threatened employees with suspension for engaging in union or other protected concerted activity.

On May 11, 2006, housekeeping employees Dolores Hernandez (Hernandez) and St. Wenceslaus Lawrence (Lawrence) were in the employee cafeteria with at least 45 other employees who had gathered to question Respondent's management about a fellow employee's recent termination. It is undisputed that just before 9 a.m., during the course of the meeting, Samayoa told Lawrence, who was on his break, "Lawrence, if you stay here any longer, you will be suspended for the rest of the day."

[9] While Draper denied mentioning the "Hangar," as the employee cafeteria was sometimes called, to Johnson, he did not deny her allegation that she would be suspended if she went to the employee cafeteria.

At about 8:07 a.m., Hernandez took his 30-minute break in the cafeteria. At about 8:30 a.m.,[10] Samayoa told Hernandez and other employees that they were suspended. Later, at about 8:37 a.m., Hernandez punched back in after his 30-minute break but returned to the cafeteria rather than to work because Samayoa had suspended him.

b. The analysis

There is no dispute that Samayoa at the direction of Trobaugh began suspending employees at about 9 a.m. However, the record is devoid of any evidence that Samayoa threatened Hernandez with suspension. Rather, the record reflects that Hernandez along with all the other employees in the cafeteria was told they were suspended. I do not find that Hernandez was threatened with suspension.

On the other hand the record is clear that Samayoa threatened Lawrence, who was still on his break, with suspension if he continued to stay in the cafeteria with his fellow employees. This threat of discipline for engaging in protected, concerted activity violates Section 8(a)(1) of the Act.

11. The June 2006 Banquet Manager Charles Perera threat

a. The facts

Complaint paragraph 19 alleges that in June 2006 Banquet Manager Charles Perera (Perera) threatened an employee with problems if the employee were to talk about the Union at the hotel.

In June 2006, on-call banquet service employee Beatrice Reyes (Reyes) had a conversation with her supervisor, Perera, in his office. Perera told Reyes he wanted to tell her something as friends. Perera said that he did not have any problems with Reyes because she was a good worker but, if she did not want to have problems that it would be better if she did not talk about the Union inside the hotel. When Reyes asked if this meant she could not talk about the Union in the hotel, Perera replied that she could talk about the Union but she had to do it outside the hotel.

b. The analysis

In *Teledyne Advanced Materials,* 332 NLRB 539 (2000), the Board found that a supervisor's warning, "not to talk to anyone about the Union or to anyone who was involved with the Union and that they could be written up if they were caught talking about the Union." violated Section 8(a)(1) of the Act. Respondent contends that the conversation between Reyes and Perera was a friendly and casual conversation that does not constitute an unlawful interrogation under *Sunnyvale Medical Clinic, Inc*., 277 NLRB 1217 (1985). Unlike the facts in *Sunnyvale Medical Clinic,* here there was an implied threat by Perera to Reyes that if she talked about the Union in the hotel she could have problems. This threat to Reyes, who was not a known union supporter, violated Section 8(a)(1) of the Act.

12. The May 11, 2006 suspension of 77 employees

Complaint paragraph 6, as amended, alleges that on May 11, 2006, Respondent suspended 77 employees for engaging in and to discourage them from engaging in protected concerted activity.

a. The facts

On May 10, 2006, waitress Patricia Simmons (Simmons) learned that fellow employee Sergio Reyes (Reyes) had been suspended. That day Simmons went to the union office and spoke with fellow employees about what had happened to Reyes. Simmons expressed concern that Reyes had been suspended because he was prounion. After contacting a number of coworkers, it was agreed that the employees would meet in Respondent's cafeteria the next day at 8 a.m. and speak with management about Reyes' suspension. On May 11, 2006, the servers and bus service employees took their breaks at 8 a.m. and, with about 75–100 of Respondent's employees began gathering in the employee cafeteria, where employees usually took their breaks, and met with Respondent's general manager, Grant Coonley (Coonley) about the recent termination of employee Sergio Reyes.

According to Waiter Miguel Vargas (Vargas) between 8:15 and 8:30 a.m., he told Samayoa that she needed to locate Coonley and have him come and speak to the gathered employees about suspended employee, Reyes. Samayoa said she would try.[11] Vargas was concerned about the time because his break was nearly over. According to Vargas, at about this time Samayoa told employees if they did not return to work they would be suspended. According to Simmons, at about 8:15 a.m. Samayoa asked employees if they were on break and if not, they needed to punch out or be suspended. According to Alberto Barajas, at about 8:20 a.m. Samayoa told employees to go back to work or they would be suspended and at 8:25 a.m. Samayoa told Barajas he was suspended.[12]

According to lobby attendant Lilia Magallon, between 8:45 and 9 a.m. Samayoa came to the cafeteria and said if you are going to, work, if not punch and leave. About 5 to10 minutes later Samayoa returned and repeated employees were to punch in or leave.

At 8:30 a.m. Vargas punched in to work from his break. Between 8:30 and 9 a.m. Samayoa returned and told the employees to punch in or go home and if they did not return to work; she would contact the police. Vargas told Samayoa and Graham Taylor the director of security to contact Coonley and not harass his fellow employees. Another attempt was made to contact Coonley.

Samayoa returned to the cafeteria between 9 and 9:30 a.m. and asked employees what they wanted. Vargas told her the employees wanted to talk about Reyes' suspension and asked if Coonley had been contacted. Later, Vargas asked Chief Steward Rogelio de la Rosa to contact Coonley or Director of Food and Beverage Tom Cook and communicate that the employees wanted to return to work.

[10] It is apparent from the record as a whole, including the security video's that Samayoa did not begin suspending employees until just before 9 a.m.

[11] Samayoa did not deny this conversation took place.

[12] Based on the entire record, including the security videos, it is unlikely that any threats of suspension occurred much before 9 a.m.

After not getting any response, between 9–9:30 a.m. the employees formed a committee of 8–10 employees, including Barajas, to tell Respondent that they wanted to return to work.[13] The committee went to the kitchen area and spoke first with Supervisor David Aragon (Aragon). Vargas told Aragon to tell Cook employees would return to work. Aragon agreed. When Aragon returned he told the group that they had been suspended and could not return to work.

A few minutes later, Executive Chef Rolf Jung approached the employees and told employees Alberto Barajas and Richard Acosta that they were suspended. Later, Assistant Director of Food and Beverage Manny Collera, Samayoa, Director of Security Taylor, and a police officer approached the committee. Vargas told them that the employees wanted to return to work. Collera said the employees could not return to work since they were suspended. Vargas asked if everyone was suspended and Collera replied yes. Samayoa said that everyone was suspended pending investigation. Vargas told Samayoa that they needed to tell the employees in the cafeteria that they had been suspended and Samayoa said that that was alright. In the cafeteria at about 10:15 to 10:30 a.m., Vargas told the gathered employees that they had all been suspended pending investigation and that all employees had to leave the hotel. Between 10:30 and 10:45 a.m., all of the employees left the cafeteria.

According to Samayoa, on May 11, 2006, she first got to the employee cafeteria at about 8:13 a.m. with Assistant Director of Housekeeping Jose Cano (Cano). Night Manager/Security Supervisor Luis Gallardo (Gallardo) told Samayoa the employees wanted to talk with Cook or Coonley. At about 8:15 a.m. Simmons told Samayoa the employees were waiting for Cook to come to the cafeteria. At about 8:18 a.m., Samayoa left the cafeteria and returned at 8:23 a.m. At 8:29 a.m., Samayoa went into the seating area of the cafeteria and spoke with Gallardo who relayed a message from Director of Human Resources Sue Trobaugh (Trobaugh). At about 8:31 a.m., Samayoa told the employees in the cafeteria to go back to work if they were not on a break. Vargas said the employees were not moving and they wanted to speak to Coonley or Cook. Samayoa said Coonley was not in the hotel and Vargas replied they needed to speak with Cook. At 8:35 a.m., Samayoa left the cafeteria. At 8:44 a.m., Samayoa returned to the cafeteria with Cano and Gallardo. Samayoa told the employees if they were not on break to go back to work. Employees responded they were not going anywhere. Samayoa repeated several times that if employees were not on break to go back to work; if they did not go back to work to clock out and go home. Vargas responded that the employees were not going anywhere. At about 8:53 a.m., Samayoa went back into the cafeteria with Cano and Gallardo. Samayoa said if the employees were not on break to go back to work and if they did not return to work they would be suspended one by one. Gallardo began writing down employees' names.

At 9:07 a.m. Chief of Security Graham Taylor (Taylor) told employees that if they were suspended they could not remain in the cafeteria. Vargas said the employees were not leaving. As shown on the security video,[14] at 10:15 a.m. the employee committee left the cafeteria. At 10:30 a.m., Samayoa told Brentner and two others in the cafeteria that they were suspended. At 10:40 a.m., Taylor went into the cafeteria and the police officer told employees they had to leave the cafeteria.

According to Gallardo, around 8:05–8:15 a.m. he heard over his radio that Samayoa needed help in the employee cafeteria. Gallardo claims employees were yelling and screaming. Gallardo met with Samayoa and Samayoa told employees if they were not on break to go back to work. Several employees including Vargas said they were waiting to meet with Cook or Coonley. At 8:33 a.m., Gallardo got a call in the kitchen from Trobaugh who said to tell Samayoa to inform the employees if they were not on break to go back to work. Samayoa told employees if they were not on break they had to return to work. If they did not return to work they had to swipe out and go home. Gallardo again spoke with Trobaugh who told him to tell Samayoa to tell the employees if they were not on break to go to work and if not they should swipe out, and be suspended pending investigation. Gallardo gave this message to Samayoa who repeated it to the employees. The employees refused to leave so once again Gallardo spoke with Trobaugh on the phone. Trobaugh told Gallardo to tell Samayoa to tell employees the same message and to suspend employees one by one. Samayoa relayed the message and began asking employees if they were returning to work. Gallardo wrote employees names down who were suspended.[15] At about 9 a.m., Taylor told employees they were suspended and had to leave or be considered trespassing and be removed by the police. Vargas told employees Taylor the employees were not leaving. Later, when Vargas returned to the cafeteria with the committee, he told the employees they had been suspended and they began leaving the cafeteria.

Contrary to Respondent's assertions there is no evidence that the employee meeting in the cafeteria prevented any employees from getting food service or coffee.[16] During the walkout, the restaurants were serviced by 15–20 members of Respondent's hotel staff including restaurant managers and other management staff.

Respondent's argument that the walkout adversely impacted its ability to clean guest rooms is likewise unsupported by the record. As half of the employees suspended were employed in housekeeping services, there were some rooms that were not cleaned the day of the work stoppage, however, there is no evidence as to how many rooms were not cleaned.[17]

[13] This group left the cafeteria at about 10:15 a.m.

[14] R. Exh. 24.

[15] R. Exh. 20.

[16] In its brief Respondent cites testimony that employees could not use the cafeteria and that unnamed employees chose not to use the cafeteria. I rejected this evidence as hearsay and it will not be considered herein. See Tr. 1546, LL. 22–25 to Tr. 1548, LL. 1–11 and Tr. 2095, LL. 23–25 to Tr. 2097, LL. 1–11. In fact employee St. Wenceslaus Lawrence was able to get coffee in the cafeteria at 9 a.m.

[17] Respondent's suggestion in its brief that 500 rooms were not cleaned misstates the testimony. Trobaugh testified that there were 500 rooms, ". . . that were not covered to clean. So, we started calling temp agencies." There is no evidence as to how many of the 500 rooms were cleaned by other employees.

b. The analysis

Both the General Counsel and the Charging Party take the position that the employees who gathered in the cafeteria on May 11, 2006, were engaged in an on the job work stoppage that is protected under the Act. Respondent contends that the work stoppage was unprotected under the Act.

For over four decades it has been settled that an in-plant work stoppage by unrepresented employees may be protected-concerted activity under the Act even though no specific demand is made. In *NLRB v. Washington Aluminum Co.,* 370 U.S. 9 (1962), the Supreme Court upheld a Board decision finding that an employee walkout, protesting the extreme cold conditions of their workplace, was protected, concerted activity although the employees made no specific demand upon the employer to remedy the lack of heat.

Recently in *Quietflex Mfg. Co.,* 344 NLRB 1055 (2005), a divided three-member panel of the Board found that an employer lawfully discharged 83 employees who engaged in a peaceful 12-hour work stoppage in the employer's parking lot to protest working conditions. The Board cited 10 factors to weigh in striking a balance between employees Section 7 rights and the private property rights of employers:

> (1) the reason the employees have stopped working.
>
> (2) whether the work stoppage was peaceful.
>
> (3) whether the work stoppage interfered with production, or deprived the employer access to its property.
>
> (4) whether employees had adequate opportunity to present grievances to management.
>
> (5) whether employees were given any warning that they must leave the premises or face discharge.
>
> (6) the duration of the work stoppage.
>
> (7) whether employees were represented or had an established grievance procedure.
>
> (8) whether employees remained on the premises beyond their shift.
>
> (9) whether the employees attempted to seize the employer's property.
>
> (10) the reason for which the employees were ultimately discharged.

In *Quietflex,* supra at 1056, the Board did not give controlling weight to any one factor and noted:

> As the Board stated in *Waco*, supra, 'the precise contours within which such [a work stoppage] is protected cannot be defined by hard-and-fast rules. Instead, each case requires that many relevant factors be weighed.' 273 NLRB at 746. Further, 'the locus of [the] accommodation [between employer and employee rights] . . . may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights and private property rights asserted in any given context.' *Hudgens v. NLRB,* 424 U.S. 507, 522 (1976).

In striking the balance in favor of private property rights in *Quietflex,* first the Board found the following factors in favor of Section 7 rights: the employees stopped working to protest working conditions; the work stoppage was peaceful; production was not seriously affected; the employer was not deprived of access to its property; the employees were unrepresented; there was no established grievance procedure; and the employees did not seize or destroy the employer's property. The Board then found that the employer's private property rights outweighed Section 7 rights based on the following factors: the work stoppage lasted 12 hours; the employees presented their grievances to management, although not all of their demands were met; the employees were told after over 11 hours of protest that they had to leave the premises by 7 p.m. or face discharge; and the employees were fired for not leaving the employer's property rather than for engaging in protected-concerted activity.

In striking this particular balance the Board majority reasoned, "However, after many hours of protest, the employees' continued presence on the Respondent's property no longer served an immediate protected interest, and the Respondent was entitled to assert its private property right."[18]

I will consider each of the 10 *Quietflex* factors in striking a balance between Respondent's property rights in its cafeteria and the employees' Section 7 rights to engage in joint action for their mutual aid and protection.

First, it is clear that the employees were engaged in protected, concerted activity in gathering to protest the suspension of a fellow employee. The Board has long held that employee protests regarding employee discipline are protected even if the discipline was lawful. *Pepsi Cola Bottling Co. of Miami Inc.,* 186 NLRB 477 (1970).

Second, there is no dispute as to the peacefulness of the employee work stoppage.

Third, there is no evidence, as noted above, that the employee work stoppage interfered with production, or deprived the employer of access to its property, including the cafeteria. The record is devoid of evidence that hotel guests were not served food, had clean rooms available or that other employees were denied access to the cafeteria. Further, it is not considered an interference with production where employees do no more than withhold their own labor as was the case here. *Quietflex,* supra at fn. 6.

Fourth, at no time were the striking employees given an opportunity to present their grievances concerning the suspension of Reyes to Respondent's management as neither of the managers the employees asked to speak to chose to be present. The record establishes that as early as 8:15 a.m. employees told supervisors and agents of Respondent that they wanted to speak to Coonley or Cook about the Reyes suspension. Even assuming for the sake of argument that the gathered employees did not tell Samayoa why they wanted to speak to Coonley or Cook, it is irrelevant as neither Cook nor Coonley chose to listen to their employee grievances. That Respondent's privacy policy may have prevented managers from discussing with employees the details of the Reyes suspension is likewise irrelevant, since it is the presentation of the employees' grievance to management that was the immediate protected interest. As long as management refused to provide the employ-

[18] *Quietflex,* supra at 1059.

ees with an opportunity to present their grievance, it continued to be an immediate protected interest.

Fifth, the employees were told that they should return to work and later were told that if they did not return to work they had to leave the Respondent's facility or face suspension. There is some disagreement as to the precise time employees were given these warnings. However, there is no dispute that employees began gathering in the employee cafeteria at about 8 a.m. in order to present their grievance concerning the Reyes discharge to management. Using Respondent's timeline, based upon the security tapes, at 8:26 a.m. Samayoa told employees if they were not on break to return to work, at 8:32 a.m. Samayoa told employees to return to work or clock out and go home and at 8:57 a.m. Samayoa told employees if they did not return to work or go home they would be suspended. Samayoa began suspending employees, an hour after the employees first gathered to present their grievance. At about 10:15 a.m., having failed to meet with management to present their grievances, a group of employees went to speak with Cook for the purpose of telling management that the employees wanted to return to work. Instead the employees were told they had been suspended and were told it was alright if they returned to the cafeteria to tell employees they had all been suspended.

Sixth, the work stoppage was barely an hour old before Samayoa began suspending employees for failure to return to work or go home. The work stoppage was just over 2 hours old when employees indicated they would return to work but were refused because they had been suspended. Finally, the work stoppage was under 3 hours old when all employees vacated Respondent's premises. See *City Dodge Center,* supra at fn. 5 (stoppage protected where all employees left the plant within 2 hours); *Golay & Co.,* supra at fn. 6 (protected stoppage lasted 1-1/2–2 hours); *Liberty Natural Products,* supra at fn. 10 (protected stoppage lasted 15–30 minutes); *Central Motors Corp.,* 269 NLRB 209 (1984) ("short-lived" stoppage was found protected); *Kenneth Trucks of Philadelphia,* 229 NLRB 815 (1977), enfd. 580 F.2d 55 (3d Cir. 1978) (protected stoppage lasted one-half hour); *Benesight, Inc.,* 337 NLRB 282 (2001) ("brief" work stoppage protected by Sec. 7); compare *Quietflex,* 344 NLRB 1055 (approximately 12-hour stoppage not protected); *Cambro,* 312 NLRB 634 (1993) (approximately 4-hour stoppage resulted in forfeiture of Act's protection); *Waco, Inc.,* 273 NLRB 746 (1976) (3-1/2-hour stoppage overstepped the boundary of a protected, spontaneous work stoppage).

Seventh, there is no argument that Respondent's employees were unrepresented. However, Respondent contends that there was an established grievance procedure, its "open door policy." The "open door policy" is found in Respondent's team member handbook at page 16.[19] The policy states:

> Hilton Los Angeles Airport is proudly committed to maintaining an open door policy. Any discrimination or recrimination against a team member for presenting an issue, problem or complaint is prohibited.
>
> A team member should always attempt to work out problems with hi/her immediate supervisor. If the issue or problem remains unsolved, the team member can seek assistance from his/her department manager, the Director of Human Resources and the General Manager.

Respondent also presented anecdotal examples of individual employees bringing their individual concerns concerning equipment to their supervisors' attention for resolution. However, the Board found a similar "open door policy" in *HMY Roomstore, Inc.,* 344 NLRB 963 (2005), addressed only individual complaints and not group grievances like the one presented in the instant case.

Eighth, there is no evidence that employees remained on Respondent's premises beyond their shift.

Ninth, there is no evidence that the employees attempted to seize Respondent's property. There is no evidence that the employees gathered in the cafeteria prevented either management or other nonstriking employees from using the cafeteria. The employees left peacefully after 2 hours and 45 minutes when Respondent refused to allow them to return to work.

Tenth, the suspension notices[20] issued to employees note:

> On Thursday, May 11, 2006 you were asked to go back to work or clock out and go home at least three times by a hotel manager. You refused to do either of these. You were then suspended pending investigation for insubordination due to you refusal to abide by a reasonable request from a manager.

At the time employees were told to go back to work or go home, the work stoppage was less than an hour old. When employees refused to leave, suspensions immediately took place. However, at the time the suspensions were announced only an hour had elapsed from the time the work stoppage had commenced. At the time employees were told to go home or be suspended, the employees were still engaged in a protected activity.

In considering all 10 *Quietflex* factors, I find that the balance falls on the side of employees' right under Section 7 of the Act. The employees withheld their labor in protest of discipline given to a fellow employee and thus engaged in protected-concerted activity. The employees took this action in the context of having no collective-bargaining representative to assist them and in the absence of an effective employer grievance procedure that addressed group grievances. The work stoppage itself was peaceful and did not interfere with the operation of the hotel or Respondent's property, unlike a prolonged sit down strike in a production area. Moreover, Respondent was nonresponsive to the employees' grievance, choosing to ignore the employees' attempts to speak with management. The work stoppage was of short duration, lasting less than an hour before Respondent warned employees that they had to return to work, go home or be suspended. Employees were suspended less than hour after the work stoppage began. After their attempts to return to work were rebuffed at 10:15 a.m., no employee remained on Respondent's property after their shift or attempted to seize Respondent's property. Finally, given the fact that employees were engaged in protected activity at the time they were suspended and that the employees' continued pres-

[19] R. Exh. 28.

[20] GC Exh. 11.

ence on the Respondent's property at the time of their suspension still served an immediate protected interest, as management had yet to hear and consider the employees' grievance, the Respondent was not yet entitled to assert its private property right. Accordingly, Respondent had no valid reason to suspend its employees other than for the assertion of their rights guaranteed under Section 7 of the Act.

I find that in suspending 77 of its employees for 5 days, Respondent violated Section 8(a)(1) of the Act as alleged.

B. The 8(a)(3) Allegations

1. The August 24, 2006 warning of Nathalie Contreras

a. The facts

Complaint paragraphs 20, 23, and 24 allege that on August 24, 2006, Respondent issued employee Nathalie Contreras (Contreras) a written warning because she placed posters in the employee cafeteria protesting insults front desk employees had received from hotel guests and managers in violation of Section 8(a)(1) and (3) of the Act.

Guest Services Agent Contreras worked at Respondent's front desk checking guests in and out of the hotel. Contreras engaged in various union activities including attending a union sponsored meeting on January 30, 2006, in the hotel basement in front of the human relations office where all the employees wore UNITE HERE T-shirts. The employees advised a security guard who was present in front of the human relations office that the employees were there to announce that they were there to tell management that they were organizing a union. A day or two later, Contreras met with Hirschsohn and told her that she was a member of the union organizing committee. Contreras also participated in a March 2006 meeting of 8–10 employees who went to speak with Eric Burkhart about an employee who had participated in a union picket line and had recently been fired. Burkhart told the employees they were not supposed to be at his office since it was not a work area. Contreras said Burkhart had an open door policy but Burkhart pointed to the employees and told them to get back to work as his area was not a work area.

In the past, hotel guests had sworn at Contreras and she had complained to Burkhart but according to Contreras he had not resolved the situation. In 2006, a hotel guest had called Contreras a "bitch" and she immediately complained to Burkhart who came out to the front desk and while apologizing to the customer for the inconvenience of not getting the room he wanted, did not confront the guest about the name he had called Contreras. On another occasion a guest called Contreras a "crack head" and Burkhart did not confront the guest but thought the comment was funny. This situation had happened in the past to Contreras and other front desk employees.

After discussing the hotel guests' harassment of employees by her coworkers, in order to protest her treatment by hotel guests, on August 24, 2006, Contreras and coworkers put up four 30-inch by 27-inch posters[21] in the employee cafeteria without management's permission. The posters depicted Guest Services agents of Respondent. During her lunchbreak on August 24, 2006, Contreras made a presentation to 15–20 coworkers in the cafeteria. Contreras said she was putting up the posters because she had been called names by hotel guests. Other employees said they too had been called inappropriate names by hotel guests. Included among the terms written on the posters were: bitch, idiot, sexy, cry baby, crack head, ignorant, stupid, moron, hottie, and incompetent. According to Contreras, in the past there had been other posters on the cafeteria walls depicting holidays or themes such as the Fourth of July or Cinco de Mayo.

On August 28, 2006, Contreras was called to Trobaugh's office where she was told that her posters violated Respondent's harassment free workplace policy Contreras then received a written warning[22] for posting information that violated that policy. The warning provided in part:

> On Thursday, August 24, 2006, Nathalie posted unauthorized information in the cafeteria that violates the hotel's 'Harassment Free Workplace Policy.' Specifically, Nathalie displayed a posting containing several offensive words, including 'bitch,' 'Sexy' and 'Moron.' Displays of such visual conduct may be considered offensive by others and create an intimidating, or hostile work environment.

Respondent's harassment free workplace policy[23] provides in pertinent part:

> The conduct prohibited by this policy includes all unwelcome conduct, whether verbal, physical, or visual, that is based upon a person's protected status, such as sex, color, race, ancestry, religion, national origin, age, disability, medical condition, martial [sic] status, veteran status, citizenship status, sexual orientation, or other protected group status or upon the protected status of the person's relatives, friends, or associates.
>
> The conduct forbidden by this policy specifically includes, but is not limited to: (a) epithets, slurs, negative stereo-typing, or intimidating acts that are based on a person's protected status; and (b) written or graphic material circulated within or posted with in the workplace that shows hostility toward a person because of his or her protected status.
>
> Sexual harassment is a problem that deserves special mention. Unwelcome sexual advances, requests for sexual favors and other verbal, physical or visual conduct based on sex constitutes harassment when (a) submission to the conduct is made as a condition of employment, (2) submission to or rejection of the conduct is used as a basis for an employment decision, or (3) the conduct creates an intimidating, hostile or offensive working environment.
>
> Sexual harassment includes conduct based on sex, whether directed towards a person of the opposite or same sex. Sexual harassment is not limited to explicit demands for sexual favors. It also may include such actions as (1) sex-oriented verbal kidding, teasing or jokes; (2) repeated

[21] Jt. Exhs. 1–4. There were two identical posters, two in English and two in Spanish.

[22] GC Exh. 4.

[23] R. Exh. 28, at 17–18.

> sexual flirtations, advances or propositions; (3) continued or repeated verbal abuse of a sexual nature; (4) graphic or degrading comments about an individual or his or her appearance; (5) the display of sexually suggestive objects or pictures; (6) subtle pressure for sexual activity; and (7) physical contact such as patting, hugging, pinching, or brushing against another person's body.

According to Trobaugh, she felt the words contained on Contreras' posters, including the terms bitch, sexy, and hottie were inappropriate and violated the hotel's harassment free workplace policy.

b. The analysis

The General Counsel contends that Contreras' conduct in putting up the posters was both union and protected, concerted activity. Respondent argues that since it properly disciplined Contreras for violating Respondent's harassment policy, she was not engaged in protected, concerted activity.

In *Meyers Industries,* 268 NLRB 493, 497 (1984) *(Meyers I)*, and *Meyers Industries,* 281 NLRB 882 (1986) (*Meyers II*), the Board defined when an individual engages in concerted activity for other mutual aid or protection. The Board in *Meyers I* stated:

> In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. [*Meyers Industries*, 268 NLRB 493, 497 (984).]

In *Meyers II*, the Board emphasized that its definition of concerted activity included individual activity where, "individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries*, 281 NLRB at 887.

Employees do not have to accept the individual's call for group action before the invitation itself is considered concerted. *Whittaker Corp.,* 289 NLRB 933, 934 (1988); *El Gran Combo,* 284 NLRB 1115 (1987). The Board in *Meyers II* held that, "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Owens-Corning Fiberglass Corp. v. NLRB,* 407 F.2d 1357, 1365 (4th Cir. 1969).

Once the General Counsel has established its prima facie case under *Meyers I and II*, the burden shifts to the respondent to show that the same action would have taken place in any event. *Wright Line,* 251 NLRB 1083, (1980).

Contreras joined with her fellow employees to protest what they perceived as Respondent's failure to protect them from unwanted harassment from hotel guests by putting up posters in the employee cafeteria during their breaktime depicting front desk workers. The posters contained inappropriate names front desk clerks had been called by hotel guests and the posters encouraged other employees to write on the posters inappropriate names they had been called by guests. Clearly, Contreras and her fellow employees were engaged in protected, concerted activity. It is likewise clear that Respondent issued discipline to Contreras for engaging in protected activity, i.e., joining with coworkers in protesting being called inappropriate names by hotel guests. Thus, the General Counsel has established a prima facie case under *Meyers*. The question remains was Contreras validly disciplined because she violated Respondent's harassment policy.

Respondent essentially takes the position that it is a violation of its harassment policy for coworkers to communicate with one another or with management about harassment to which they have been subject. There is no evidence that Contreras used any of the terms listed on the posters against another employee or that any employee complained about the posters. Respondent would have to torture its own definition of sexual harassment in subparagraph four of its harassment free workplace policy in order to conjure up a violation by Contreras. It turns the harassment free workplace policy on its head to suggest that Contreras and others, who were victims of sexual harassment by hotel guests and managers who took no action, somehow violated the policy themselves by communicating with one another about the harassment.

Respondent contends that it has uniformly applied the harassment free workplace policy and disciplined other employees who violated the policy. However, the examples[24] cited by Respondent are clearly inapposite as they apply to situations where one employee directed foul language or threats against another employee. Here, Contreras never directed inappropriate language toward another employee but rather communicated that such comments had been directed toward her and other employees by hotel guests.

I find that the application of Respondent's harassment free workplace policy in Contreras' discipline was a pretext for retaliating against her protected, concerted activity.

I find further that Respondent violated Section 8(a)(1) of the Act in disciplining Contreras. However, I find no violation of Section 8(a)(3) of the Act, as the discipline was motivated only by Contreras' protected, concerted activity that was independent of her union activity.

2. The June 2006 warnings to employees

a. The facts

Complaint paragraph 21 alleges that on June 7, 2006, Respondent issued written warnings to employees Isabel Brentner (Brentner), Lilia Magallon (Magallon), Isabel Salinas (Salinas), and Joanna Gomez (Gomez) and complaint paragraph 22 alleges that on June 10, 2006, Respondent issued a written warning to employee Patricia Simmons (Simmons) because the employees engaged in union and other protected concerted activities.[25]

[24] R. Exhs. 35–42.

[25] Respondent stipulated that it knew of Brentner, Magallon, Salinas, Gomez, and Simmon's union activities. Tr. 2258.

(1) The Simmons warning

Simmons had openly participated in union meetings at the Hotel, including the January 30, 2006 meeting at the human resources office where employees gathered to tell Respondent they wanted union representation, and in the May 11, 2006 employee cafeteria work stoppage. There is no dispute that Respondent was aware that Simmons was a union supporter.

On the weekend of June 2–4, 2006, the California Teachers Association (CTA) was conducting a meeting at Respondent's facility. In addition to other facilities, CTA was using two of Respondent's ballrooms on the hotel lobby level, including the International Ballroom. On June 2, 2006, Simmons, a waitress in one of Respondent's restaurants, was asked by CTA to speak to its members gathered in the International Ballroom about the suspension of Respondent's employees on May 11, 2006. Simmons agreed to speak if it was while on her break.

On June 3, 2006, while on her lunchbreak, Simmons addressed the CTA members gathered in the International Ballroom for about 10 minutes. Simmons explained that Respondent's employees had been suspended on May 11, 2006, because they wanted to ask management about a coworker who had been fired. There were hundreds of CTA members in the ballroom but Simmons did not see Magallon or Salinas in the Ballroom. Simmons returned to work on time.

After she punched back in to work, Simmons met Collera and Cook. Cook asked Simmons where she had been. Simmons said she had been on break. When Cook asked where she had been, Simmons said she was in the International Ballroom at the CTA convention. Cook said she was not supposed to be there. When Simons asked why not Cook replied that it was hotel policy that she could take a break only in the employee cafeteria. Simmons told Cook that over the past 20 years she had been in other guest events in the hotel's ballrooms including AMMA. Simmons said she had never been told by a supervisor not to attend guest events at the hotel.

On June 10, 2006, Simmons received a written warning that states:[26]

> On Saturday, June 3, 2006, you were seen in an inappropriate area of the Hotel (International Ballroom) while on your break.
>
> The hotel's Team Member Handbook specifically states that it is a violation of company policy for being in an unauthorized or non-designated work or guest areas [sic] during scheduled work periods, or on your days off, without your supervisor's or management's specific authorization.

Prior to May 4, 2006, Respondent's policy concerning use of Hotel facilities by its employees was set forth in its team member handbook.[27] The policy stated:

> TEAM MEMBERS ON PREMISES
>
> Only those team members scheduled for work are authorized to be on Hotel property. You should arrive on property no more than 30 minutes prior to the start of your shift, and must leave the property within 30 minutes from the end of your shift. The only exceptions to this rule are for situations in which you are picking up paychecks, or coming in at the request of your team leader or Human Resources.
>
> USE OF PUBLIC AREAS
>
> During working hours, team members are not permitted to use the public areas of the Hotel, unless specifically assigned. These areas include, but are not limited to: guest elevators, the lobby, and banquet and guest rooms. Unless you have been assigned to be in a public area, your presence there is unauthorized.

On May 4, 2006, Respondent issued a revised policy dealing with employees' use of hotel facilities when off duty.[28] The policy provides:

> Use of Location Facilities by Off-Duty Team Members
>
> Team members who are "off duty" (i.e., time which a team member is not being compensated to perform job duties, or on a bona fide rest period) may not enter or remain in the hotel's working areas, except for one of the following reasons:
>
> Paycheck pick-up
> Attendance at a department meeting (paid time)
> Attendance regarding their employment (i.e. benefits, disciplinary meeting)
> Attendance at a Hilton-sponsored team member function
>
> Team members are requested to provide advance notice to the hotel's senior manager or his or her designee of attendance at any non-Hilton sponsored function. Team members are asked to provide as much advance notice as possible for legitimate business reasons.
>
> . . . .
>
> This policy does not prevent off-duty team members from enjoying, as a guest, the Hotel's facilities such as the restaurant. However, for security and other business reasons, team members are requested to provide advance notice to and obtain the approval of the Hotel's senior manager prior to such use.

(2) The Magallon warning

On June 3, 2006, lobby attendant Lilia Magallon (Magallon) worked the 7 a.m. to 3:30 p.m. shift, cleaning the lobby area, including the area outside the International Ballroom. Magallon testified that at no time on June 3, 2006, did she enter the International Ballroom while CTA was conducting a meeting.

Respondent stipulated that it knew of Magallon's union activities and Magallon participated in the May 11, 2006 work stoppage and a February 2006 meeting with Coonley in the housekeeping department where she spoke to Coonley about union representation.

On June 7, 2006, Magallon received a written warning from Samayoa for being in an inappropriate area of the hotel while during working hours while not on her break.[29] During the meeting with Samayoa where she was given the warning, Ma-

[26] GC Exh. 6.
[27] R. Exh. 28, pp. 60–61.
[28] GC Exh. 5.
[29] GC Exh.7.

gallon denied being in the International Ballroom on June 3 but said that she was cleaning the trash cans outside the International Ballroom on June 3.

(3) The Brentner warning

Izabel (Segunda) Brentner (Brentner) was working as a lobby attendant on June 3, 2006. Her duties include cleaning the International Ballroom as needed. Brentner openly participated in the May 11, 2006 work stoppage as well as the January 30, 2006 employee meeting at the human resources office to demand union representation. While on her lunchbreak on June 3, 2006, Brentner was asked by the CTA to address its membership in the International Ballroom. Brentner spoke to the CTA group for about 15 minutes and thanked them for donations they had given to the 77 employees Respondent had suspended on May 11, 2006. Brentner saw neither coworker Juana Salinas nor Lilia Magallon in the International Ballroom when she spoke. Brentner returned to work at about 11:30 a.m.

On June 7, 2006, Brentner received a written warning[30] from Samayoa for being in an inappropriate area of the hotel (International Ballroom) on June 3, 2006, during working hours when not on a break.

(4) The Salinas warning

Respondent's lobby attendant, Juana Isabel Salinas (Salinas), took part in the May 11, 2006 work stoppage although she did not play a prominent role. On June 3, 2006, Salinas was working as a lobby attendant and her duties included cleaning trash cans outside the International Ballroom. Salinas was working with coworker Joanna Gomez (Gomez) cleaning the area around the International Ballroom. Salilnas denied that she entered the International Ballroom on June 3, 2006. However, on June 7, 2006, Salinas received a written warning[31] from Samayoa. At the meeting when Samyoa gave Salinas the warning, Samayoa said the warning was for entering the International Ballroom when CTA was present. Salinas denied being in the ballroom but rather had been cleaning the trash near the ballroom.

(5) The Gomez warning

Respondent's public area attendant, Joanna Gomez, also received a written warning[32] for being in the International Ballroom on June 3, 2006, during working hours when not on a break. Gomez did not testify and there is no evidence of her protected, concerted activity, although she was suspended for engaging in the May 11, 2006 work stoppage.[33] Respondent stipulated to knowledge of Gomez' union activity.

(6) Respondent's investigation

Respondent's assistant director of human relations, Rochelle Romo (Romo), reviewed the security tape from June 3, 2006, in and around the International Ballroom. After reviewing the tapes, Romo gave a summary to Trobaugh of her investigation. Based on the tapes, Respondent issued the written warnings to Gomez, Magallon, and Salinas. However, as Respondent admits, while the tapes show Gomez, Magallon, and Salinas were in the vicinity of the International Ballroom doors, they fail to establish that Gomez, Magallon, or Salinas ever entered the ballroom. Romo never interviewed any of the housekeepers as part of her investigation.

Trobaugh testified that Respondent has previously disciplined employees for being in unauthorized areas of the hotel.[34] One employee was disciplined in 2005 for driving a hotel shuttle van to an unauthorized location for personal use, two employees were disciplined in 2005 for using the hotel pool while off duty and another employee was disciplined in July 2006 for collecting cans and bottles in unauthorized areas of the hotel.

b. The analysis

The General Counsel contends that Respondent violated Section 8(a)(1) and (3) of the Act by disciplining Brentner, Magallon, Salinas, Gomez, and Simmons and disparately enforced its use of location facilities policies concerning presence of off-duty employees in working areas of the hotel as a result of their union and protected concerted activity.

The Charging Party argues that Respondent violated Section 8(a)(1) of the Act in disciplining Simmons in applying its use of location facilities policy to preclude Simmon's solicitation of support from the CTA. The Charging Party also takes the position that Respondent violated Section 8(a)(3) of the Act in disciplining Brentner, Magallon, Salinas, and Gomez for engaging in union activity.

Respondent denies it violated Section 8(a)(1) or (3) of the Act and issued discipline pursuant to its consistently applied policies which Brentner, Magallon, Salinas, Gomez, and Simmons violated.

Soliciting support or sympathy from the general public in furtherance of issues involving terms and conditions of employment is activity protected by Section 7 of the Act. *Alaska Pulp Corp.,* 296 NLRB 1260 (1989).

As noted above, the Board has found that once an individual has engaged in protected-concerted activity, an 8(a)(1) violation will be found if the employer knew of the protected-concerted activity and the discipline was caused by the employee's protected, concerted activity. *Meyers I* and *II,* supra.

Once the General Counsel has established its prima facie case under *Meyers I* and *II,* the burden shifts to the Respondent to show that the same action would have taken place in any event. *Wright Line,* 251 NLRB 1083 (1980).

In order to find a violation of Section 8(a)(3) of the Act, the General Counsel has the initial burden of establishing that union activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3) of the Act. The elements required to support such a prima facie violation of Section 8(a)(3) are union activity, employer knowledge of the activity, and a connection between the employer's antiunion animus and the discriminatory conduct. Once the General Counsel has established its prima facie case, the burden shifts to Respondent to show that it would have taken the disciplinary action even in the absence of protected activity. *Wright Line,* 251 NLRB 1083 (1980).

[30] GC Exh. 9.
[31] GC Exh. 10.
[32] GC Exh. 18.
[33] GC Exh. 1(n), app. A at 2.
[34] R. Exhs. 31–34.

Motive or animus may be inferred from all of the circumstances in the absence of direct evidence. A blatant disparity is sufficient to support a prima facie case of discrimination. *Flour Daniel. Inc.,* 304 NLRB 970 (1991). As stated by the Board: "A pretextual reason, of course, supports an inference of an unlawful one." *Keller Mfg. Co*., 237 NLRB 712, 717 (1978).

The disparate nature of discipline, the unprecedented scope of an investigation, the absence of a cogent reason for conducting such an investigation, and the failure to afford a discriminatee any opportunity to answer the allegations raised by the investigation are factors that have repeatedly been found adequate to infer discriminatory motivation. *Tubular Corp. of America,* 337 NLRB 99 (2001).

It is clear that both Brentner and Simmons were engaged in protected, concerted activity at the time they addressed members of the CTA in Respondent's International Ballroom concerning the May 11, 2006 work stoppage and suspension of employees. Respondent was aware that both that both Brentner and Simmons were present at the CTA meeting but there is no evidence that Respondent knew that Brentner, Simmons, Magallon, Salinas, or Gomez either addressed the CTA, knew what they said, or knew that they had participated in the CTA meeting in any way.[35] There is nothing on the face of the written warnings each of the employees received that suggests the discipline was for speaking to the CTA rather than for being in an unauthorized part of the hotel. Respondent was aware that all five employees participated in the May 11, 2006 work stoppage, although none played a prominent role. I find there is no evidence Respondent had knowledge the five employees engaged in protected, concerted or union activity on June 3, 2006, and that their May 11, 2006 protected, concerted activity played no role in their June 2006 discipline.

Respondent has stipulated that it was aware that all five employees disciplined had engaged in union activity.

The General Counsel contends that Respondent's discriminatory motive is supplied by Respondent's failure to adequately investigate the employees' alleged misconduct by failing to interview them and by discriminatorily applying its new use of location facilities policy.

With respect to the General Counsel's first contention, while Simmons and Brentner admitted they were at the CTA meeting in the International Ballroom, a further investigation into their presence would have revealed that they were there at CTA's invitation. The investigation into Magallon, Salinas, and Gomez' presence in the CTA meeting is more troubling, since they were in the vicinity of the ballroom performing their regular duties and Respondent's evidence failed to show that Magallon, Salinas, and Gomez entered the International Ballroom. Despite Respondent's inconclusive evidence, no attempt was made to obtain Magallon, Salinas, or Gomez' version of events.

With respect to the discriminatory application of the use of location facilities policy, the General Counsel contends that Respondent has allowed employees to attend other functions in its ballrooms and under its new use of location facilities policy off-duty employees are not required to have management's permission to use the hotel's facilities, as guests.

The record establishes that prior to June 2006, Respondent's employees had attended functions conducted by other organizations in the hotel ballrooms including AMMA, Conscious Life Expo, and the Emerald Ball without discipline. According to Respondent, employee attendance was permitted because the outside organizations had told Respondent they would permit Respondent's employees to attend and Respondent had assented to their employees' presence. However, in this case CTA not only assented to Simmons and Brentner's presence, it invited them to attend and address its meeting. A cursory investigation into the events would have disclosed that Simmons and Brentner had CTA's permission to attend their meeting and thus were CTA's guests. The uneven enforcement of Respondent's policy likewise shows disparate enforcement of its policy. Thus, while Respondent cited four examples of enforcement of its policy for being in unauthorized areas of the hotel, two disciplines involved being in an unauthorized area, the hotel pool, one discipline was for personal use of a hotel shuttle and the other was for collecting cans. Yet, in 2006 Respondent knowingly tolerated violation of its use of public areas policy when it knew employees were using public restrooms near the lobby café. No investigation was conducted and no discipline issued. Moreover, the language itself of Respondent's amended use of public areas policy did not require management's permission for off duty employees to use public areas of the hotel as guests or to attend non-hotel functions. The new policy only requests employees to seek advanced permission of management.

It is apparent that Respondent's application of its new use of location facilities by off-duty team members policy was disparately applied and was used as a pretext to discipline its employees it knew had engaged in union activity. Respondent's investigation into violation of its policy did not attempt to elicit the employees' version of facts which would have disclosed that Simmons and Brentner had CTA's permission to attend the meeting, consistent with Respondent's policy that no longer required advanced permission of management to attend outside functions. Interviews with Magallon, Salinas, and Gomez would have disclosed they did not enter the CTA meeting but consistent with the security videos[36] were performing their usual duties cleaning the lobby near the ballroom. In view of all of the above, I conclude that Respondent's reason for issuing discipline to Simmons, Brentner, Magallon, Salinas, and Gomez does not stand scrutiny and provides the motivation for

[35] While there is some evidence that Brentner's address to the CTA could be heard over a PA system outside the International Ballroom, there was no evidence that any supervisor or agent of Respondent heard Brentner via the PA system.

[36] Respondent contends that the videos lead to a reasonable inference that Magallon, Salinas, and Gomez entered the ballroom. However, the tapes show only that Magallon, Salinas, and Gomez were out of camera view for no more than a minute, consistent with their testimony that they were engaged in their normal cleaning duties. Given the tenuous nature of this evidence, the failure to elicit their version of the events, leads to the inference of discriminatory motivation. *Tubular Corp. of America,* supra.

the discipline, the employees' union activity. *Tubular Corp. of America,* supra*; Flour Daniel. Inc.,* supra*; Keller Mfg. Co.,* supra. Having so found, Respondent can not satisfy its burden under *Wright Line* to establish it would have disciplined the employees in the absence of their union activity.

I find that Respondent issued written warnings to Simmons, Brentner, Magallon, Salinas, and Gomez in violation of Section 8(a)(3) of the Act but in the absence of knowledge of their protected, concerted activity did not violate Section 8(a)(1) of the Act.

The Back Pay Specification

The parties stipulated at the hearing that the backpay amounts set forth in appendixes A and B of the complaint were correct.[37] However, with respect to employee Melvin Sampole, Respondent had rescinded his suspension and made him whole. I find the backpay claims to be supported by the record.

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

CONCLUSIONS OF LAW

1. Respondent has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:

(a) Suspending 77 employees for engaging in protected-concerted activities.

(b) Interrogating employees about union and other protected-concerted activities.

(c) Physically pushing and touching employees for engaging in protected, concerted activities.

(d) Threatening employees with violence if they engaged in protected, concerted activity.

(e) Denying access to Respondent's facility and threatening employees with trouble if they entered the hotel because employees wore union insignia.

(f) Threatening employees with suspension if they participated in protected, concerted activity.

(g) Issuing a written warning to employee Nathalie Contreras for engaged in protected, concerted activity.

(h) Threatening an employee with unspecified reprisals if the employee engaged in union activity.

4. Respondent violated Section 8(a)(1) and (3) of the Act by issuing written warnings to Isabel Brentner, Lilia Magallon, Isabel Salinas, Joanna Gomez, and Patricia Simmons for engaging in union activity.

5. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not otherwise violate the Act as alleged in the consolidated complaint and the remaining complaint allegations will be dismissed.

[37] Tr. 24–25 and 204–207.

REMEDY

Having found that the Respondent violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices addressing the violations found.

The Respondent having discriminatorily suspended employees, they must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Upon the above findings of fact and conclusions of law, and on the basis of the entire record, I issue the following recommended[38]

ORDER

The Respondent Fortuna Enterprises, L.P., a Delaware Limited Partnership d/b/a/ The Los Angeles Airport Hilton Hotel and Towers, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending employees for engaging in protected-concerted activities.

(b) Interrogating employees about union and other protected, concerted activities.

(c) Physically pushing and touching employees for engaging in protected, concerted activities.

(d) Threatening employees with violence if they engaged in protected, concerted activity.

(e) Denying access to Respondent's facility and threatening employees with trouble if they entered the hotel because employees wore union insignia.

(f) Threatening employees with suspension if they participated in protected, concerted activity.

(g) Issuing written warnings to employees for engaging in union and other protected, concerted activities.

(h) Threatening an employee with unspecified reprisals if the employee engaged in union activity.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necesary to effectuate the policies of the Act.

(a) Make whole the individuals named below, by paying them the amounts following their names, with interest to be computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws:

Juan Jimenez	$696.19
Silviano Castillo	745.19
Agustin Vega	479.70

[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

Juan Vizuete	513.44
Marco Zamudio	481.70
Rosario Mendoza	296.21
Alejandra Chamorro	194.40
Alicia Huizar	550.50
Benjamin Lopez	534.50
Francisco Diaz	642.37
Miguel Vargas	740.14
Patricia Simmons	743.51
Raul Gonzalez	544.13
Rigoberto Gomez	796.38
Wilfredo Matamoros	703.05
Alberto Barajas	599.42
Richard Acosta	584.37
Samuel Zambrano	579.21
Cliff Lai	446.93
Adela Barrientos	447.75
Amelia Luna	450.24
Ana Flamenco	450.24
Blanca De la Torre	432.14
Christopher Fawcett	429.75
Claudina Colomer	418.56
Concepcion Molina	450.24
Edith Garcia	432.14
Estela Cabreras	450.24
Eva Pulido	458.40
Fernando Gutierrez	437.80
Gloria Saldana	450.45
Guadalupe Perez	429.75
Immacula Rene	440.29
Isabel Brentner	467.10
Ivan Gomez	393.75
Jaime Chamul	416.25
Joanna Gomez	416.25
Jose Ayala	437.80
Josefina Castillo	474.22
Juana Salinas	474.22
Juliete Cabrera	447.75
Kathy Andrade	447.75
Lazaro Orellana	429.75
Lazaro Soto	474.22
Lenardo Reynoso	418.56
Lidia Zavala	418.56
Lilia Magallon	461.12
Lillian Alcantara	447.75
Manuel Alvarez	447.75
Maria Ceja	438.02
Maria Hernandez	418.56
Maria Martinez	440.44
Maria Nunez	471.60
Maria Osuna	458.40
Marina Rivera	432.14
Raquel Benitez	447.75
Reyna Vasquez	432.14
Rigoberto Matamoros	459.74
Rolando Romero	429.75
Rosa Vaca	422.59
Rosie Delgado	475.11
Ruben Can	440.16
Silvia Alvarez	447.75
St. Wenceslaus Lawrence	422.59
Susana Argumedo	447.75
Victor Salgero	450.24
Zulma Jurado	422.59
Concepcion Ortiz	446.40
Jose Luis Garcia	499.27
Jose Molina	431.14
Maria Letona	422.45
Mauricio Hernandez	414.03
Fernando Vasquez	389.38
Fidel Andrade	457.48
Nieves Contreras	435.16
Ricardo Chapa	454.05
Total	$36,052.74

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions of the above-named 76 employees, and the unlawful written warnings of Nathalie Contreras, Patricia Simmons, Isabel Brentner, Lilia Magallon, Joanna Gomez, and Isabel Salinas and within 3 days thereafter notify the employees in writing that this has been done and that the suspensions and warnings will not be used against them in any way.

(c) Within 14 days after service by the Region, post at its 5711 West Century Boulevard, Los Angeles, California facility copies of the attached notice marked "Appendix"[39] in both the English and Spanish languages. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 3, 2006.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 21, 2008.

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT suspend you or issue you written warnings because you engage in union or other protected, concerted activities.

WE WILL NOT interrogate you about your union and other protected, concerted activities.

WE WILL NOT physically push or touch you for engaging in protected, concerted activities.

WE WILL NOT threaten you with violence if you engage in protected, concerted activity.

WE WILL NOT deny you access to Respondent's facility and threaten you with trouble if you enter the hotel because you wear union insignia.

WE WILL NOT threaten you with suspension or unspecified reprisals if you participate in union or protected, concerted activity.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL make whole the below named employees for any loss of wages and benefits, with interest, that they suffered as a result of their suspensions:

Juan Jimenez
Silviano Castillo
Agustin Vega
Juan Vizuete
Josefina Castillo
Juana Salinas
Juliete Cabrera
Kathy Andrade
Marco Zamudio
Rosario Mendoza
Alejandra Chamorro
Alicia Huizar
Benjamin Lopez
Francisco Diaz
Miguel Vargas
Patricia Simmons
Raul Gonzalez
Rigoberto Gomez
Wilfredo Matamoros
Alberto Barajas
Richard Acosta
Samuel Zambrano
Cliff Lai
Adela Barrientos
Amelia Luna
Ana Flamenco
Blanca De la Torre
Christopher Fawcett
Claudina Colomer
Concepcion Molina
Edith Garcia
Estela Cabreras
Eva Pulido
Fernando Gutierrez
Gloria Saldana
Guadalupe Perez
Immacula Rene
Isabel Brentner
Ivan Gomez
Jaime Chamul
Joanna Gomez
Jose Ayala
Lazaro Orellana
Lazaro Soto
Lenardo Reynoso
Lidia Zavala
Lilia Magallon
Lillian Alcantara
Manuel Alvarez
Maria Ceja
Maria Hernandez
Maria Martinez
Maria Nunez
Maria Osuna
Marina Rivera
Raquel Benitez
Reyna Vasquez
Rigoberto Matamoros
Rolando Romero
Rosa Vaca
Rosie Delgado
Ruben Can
Silvia Alvarez
St. Wenceslaus Lawrence
Susana Argumedo
Victor Salgero
Zulma Jurado
Concepcion Ortiz
Jose Luis Garcia
Jose Molina
Maria Letona
Mauricio Hernandez
Fernando Vasquez
Fidel Andrade
Nieves Contreras
Ricardo Chapa

WE WILL remove from our files any reference to the unlawful suspensions of the above-named employees as well as the unlawful written warnings of Nathalie Contreras, Patricia Simmons, Isabel Brentner, Lilia Magallon, Joanna Gomez, and Isabel Salinas, and WE WILL not make reference to the suspensions or written warnings in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker and we will not use the permanently removed material against you.

FORTUNA ENTERPRISES, L.P. A DELAWARE LIMITED PARTNERSHIP D/B/A THE LOS ANGELES AIRPORT HILTON HOTEL AND TOWERS